Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-876

PETER MACDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on Behalf of the Navajo Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Navajo Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882,

Petitioner,

v.

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Hopi Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882, and EDWARD H. LEVI, Attorney General of the United States, on Behalf of the United States,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ABBOTT SEKAQUAPTEWA IN OPPOSITION

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INDEX

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

I. THE ORIGINAL ORDERS OF THE DISTRICT COURT UPON WHICH THE CONTEMPT CITATION IS BASED HAVE BEEN SUBJECT TO PRIOR APPEALS AND ARE NOT NOW PROPERLY SUBJECT TO REVIEW 7

II. THE ORDERS OF THE DISTRICT COURT, WHICH PETITIONER CONCEDES WERE NOT COMPLIED WITH, WERE SUFFICIENTLY CLEAR TO ENABLE PETITIONER AND THE NAVAJO TRIBE TO UNDERSTAND WHAT WAS REQUIRED OF THEM AND TO ACT ACCORDINGLY 9

Page

III. FEDERAL ADMINISTRATIVE PROCEDURES FOR THE CANCELLATION OF THE NAVAJO GRAZING PERMITS ARE NOT APPLICABLE IN THE CASE AT BAR 12

IV. NO CONGRESSIONAL INTENT EXISTED TO DIVEST THE DISTRICT COURT OF JURISDICTION OR WHICH WOULD HAVE REQURED THE DISTRICT COURT TO ACCEPT A PLAN OFFERED BY A PARTY BEFORE THAT COURT, CONTRARY TO THE PRIOR ORDERS OF THE COURT 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Hamilton v. MacDonald, 503 F.2d 1138 (9th Cir. 1974) 6, 8

Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971) cert. den. 406 U.S. 945 (1972) 5, 14

Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962) aff'd 373 U.S. 758 (1963) 4, 9, 13

Longshoreman's Asso. v. Philadelphia Marine Trade Asso., 389 U.S. 64 (1967) 11

Page

Morton v. Mancari, 417 U.S. 535 (1974) 15

Sekaquaptewa v. MacDonald, No's 74-1936, 74-2215, and 76-1006 (9th Cir., filed September 27, 1976) 544 F.2d 396 ..... 7, 9, 10, 11, 16, 17

United States v. Kabinto, 456 F.2d 1087 (9th Cir. 1972) 14

United States Trust Co. v. New Mexico, 183 U.S. 535 (1902) 9

Winton v. Amos, 255 U.S. 373 (1921) 13, 14

Statutes:

Constitution of the United States
Article I, §8, cl. 3 15

5th Amendment 13

Act of July 22, 1958, 72 Stat. 403 ..... 2, 4, 6

Act of December 22, 1974, 88 Stat. 1712, 25 U.S.C. §640d 2, 14, 15, 16, 17

Administrative Procedures Act
5 U.S.C. §701(a)(2) 15

25 C.F.R. §151.13 (1976) 11, 12

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT ABBOTT SEKAQUAPTEWA IN OPPOSITION

Respondent Abbott Sekaquaptewa, in his congressionally designated representative capacity for the

Hopi Indian Tribe and its individual villages, clans and members, submits this Brief in Opposition to the Petition for a Writ of Certiorari filed herein and respectfully states that no issue meriting plenary consideration by this court is present herein.

OPINIONS BELOW

544 F.2d 396

The opinion of the Ninth Circuit Court of Appeals (App. A with Petition) is not yet reported. The Orders of the Arizona Federal District Court which are affirmed by that opinion (App. B, C and D with Petition) are unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

Respondent does not believe that any constitutional provisions or federal regulations are reasonably involved. The two statutes involved, the Act of July 22, 1958, 72 Stat. 403 (App. F with Petition) and the Act of December 22, 1974, 88 Stat. 1712, 25 U.S.C. § 640d et. seq. (App. G with Petition) are special jurisdictional acts dealing with the resolution of land disputes between the Hopi and Navajo Indian Tribes.

QUESTIONS PRESENTED

1. Whether petitioner can obtain an additional opportunity for review of questions, upon which the

contempt citation is based, when said questions could have been raised in former appeals that were unsuccessfully pursued.

2. Whether the orders of the district court, upon which the citation for contempt is based, were sufficiently clear to enable petitioner and the Navajo Tribe to understand what was required of them.

3. Considering the fact that the district court was proceeding under a special jurisdictional act and had, as parties before it, the United States, the Navajo Tribe, and all interested Navajo individuals, whether the district court was required to follow administrative regulations promulgated by an officer of one of the defendants, the United States, to implement its prior decrees cancelling Navajo grazing permits.

4. Whether orders of the district court concerning livestock reduction are superseded by conflicting plans of the Secretary of the Interior, acting under congressional mandate to immediately commence livestock reduction, when nothing in the Congressional act or in the legislative history discloses any intention on the part of Congress to modify or alter the orders of the district court or to limit its authority to enforce those orders.

STATEMENT OF THE CASE

This case arises from the continuing efforts of the Hopi Indian Tribe, through its congressionally designated representative, respondent Abbott Sekaquaptewa,

to obtain the enjoyment of its joint, undivided and equal interest in and to the so-called Hopi-Navajo Joint Use Area, from the Navajo Tribe. See *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962) aff'd. 373 U.S. 758 (1963) (sometimes hereinafter referred to as "*Healing*").

Healing v. Jones, supra, was a quiet title action between the Hopi and Navajo Indian Tribes which proceeded under a special jurisdictional act, the Act of July 22, 1958, 72 Stat. 403 (App. F with Petition). The land subject to the quiet title action was the 1882 Executive Order Reservation in Northern Arizona, containing approximately 2,500 000 acres. Approximately one-fifth of this land was determined to be exclusively Hopi and title was quieted accordingly. The remaining four-fifths, occupied almost exclusively by Navajos, was declared to be held by the Hopi and Navajo Tribes on a joint, equal and undivided basis. This area is referred to as the "Joint Use Area." Title in the tribes, in both cases, was subject to the trust title of the United States.

The name Joint Use Area has not proved to be descriptive of events therein since the *Healing* decision. For approximately seven years after *Healing*, the Hopi Tribe tried informally to persuade the Navajo Tribe to deliver up one-half of the use and possession of the area to the Hopi Tribe and to get the Navajo Tribe to prevent the overgrazing by Navajo stockmen which was seriously depleting the Joint Use Area range. All such informal efforts failed, and the Hopi Tribe petitioned the United States District Court for Arizona in 1970 for a Writ of Assistance to force the

Navajo Tribe to permit the Hopi Tribe to utilize its one-half interest in the Joint Use Area. The district court initially refused such relief, but was reversed by the United States Court of Appeals for the Ninth Circuit which held that a single judge of the Arizona Federal District Court could,

> Hear testimony from the parties and from representatives of the United States as to what the actual situation is, and can tailor the relief to be afforded to the facts that confront him, always bearing in mind that the objective is to achieve what the court has decreed, the exercise by the Hopi and the Navajo of their "joint, undivided and equal interests as to the surface and subsurface and all resources appertaining thereto [in the lands in question], subject to the trust title of the United States." *Hamilton v. Nakai*, 453 F. 2d 152, 162 (9th Cir. 1971).

Certiorari to review that decision was denied by this court. 406 U.S. 945.

Upon remand, the Arizona Federal District Court held a hearing, made findings (App. M with Petition), and issued an Order of Compliance (App. N with Petition) and Writ of Assistance (App. O with Petition) directing the reduction of Navajo livestock in the Joint Use Area, forbidding new Navajo construction in the Joint Use Area, cancelling all grazing permits in the Joint Use Area as of one year from the date of the Order, directing the government to conduct range reconnaissance surveys, and otherwise ordering that the Navajo Tribe and the government "grant and permit the joint use and possession" of all Joint Use Area lands

by the Hopi Tribe (See App. N, pp. N-2 through N-4 with Petition).

Following the issuance of these orders, petitioner herein took an appeal from both the Order of Compliance and the Writ of Assistance to the United States Court of Appeals for the Ninth Circuit. Then, as now, petitioner appeared as a party as the congressionally designated litigation representative of any "Navajo . . . Indians claiming any interest in the area set aside by the Executive Order dated December 16, 1882" (Act of July 22, 1958; App. F with Petition). Despite the fact that the Order of Compliance specifically cancelled all grazing permits in the Joint Use Area as of one year from the date of the Order (See App. N, pp. N-2 and N-3 with Petition), no claim of any denial of due process rights nor of any need to comply with federal administrative regulations was made on that appeal. The Order of Compliance and Writ of Assistance were affirmed by the court of appeals without modification. See *Hamtion v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974).

Consolidated with the opinion in *Hamilton v. MacDonald*, was a separate appeal in which petitioner attacked the district court's approval of an implementation plan submitted by the government. As noted in the appellate court's opinion, that implementation plan restricted Navajo construction in the Joint Use Area and limited livestock grazing by individual Navajos to one-half or less of the Joint Use Area capacity (*Hamilton v. MacDonald, supra*, 503 F.2d at 1142). This

order was also affirmed by the court of appeals without modification.

As a result of the failure of the petitioner and the Navajo Tribe to take any meaningful steps to reduce Navajo livestock in the Joint Use Area or prevent further unauthorized Navajo construction therein, the district court cited both petitioner and the Navajo Tribe for Contempt of Court on May 29, 1974 (App. C with Petition). The Petition herein concedes that, at the time the contempt citation was issued, there were almost fifteen times as many Navajo livestock grazing in the Joint Use Area as permitted by the court's orders and that there were at least twenty Navajo structures constructed in the Joint Use Area in violation of the courts orders. See Petition pp. 8-9.

Petitioner seeks review herein of the consolidated opinion of the court of appeals (*Sekaquaptewa v. MacDonald*, App. A with Petition) which affirmed, without modification, petitioner's attacks on three separate orders of the district court. including the contempt citation.

ARGUMENT

I

THE ORIGINAL ORDERS OF THE DISTRICT COURT UPON WHICH THE CONTEMPT CITATION IS BASED HAVE BEEN SUBJECT TO PRIOR APPEALS AND ARE NOT NOW PROPERLY SUBJECT TO REVIEW.

As noted above, the Order of Compliance (App. N with Petition) decreed several things, including reduction of Navajo livestock by a date certain, cancellation of all grazing permits in the Joint Use Area on a date certain, and forbade new construction in the Joint Use Area without permission from both Tribes. Since this order was issued, the petitioner has taken numerous appeals from every order of the district court. Included in these appeals was one specifically from both the Order of Compliance and the Writ of Assistance issued therewith. These orders were affirmed by the Ninth Circuit Court of Appeals, without modification, in its opinion in *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974).

Likewise, the *Hamilton v. MacDonald* opinion affirms an order of the district court approving a government plan which provided for a severe limitation on Navajo livestock grazing and limited Navajo construction, both in the Joint Use Area.

Respondent supmits that any review of the content of the orders of the district court upon which the contempt citation was based is not now timely. To the extent that the matters which petitioner now seeks to raise were not in fact raised in the prior appeals, petitioner is deemed to have waived any right to a review thereof.

This conclusion is required by the doctrine of the law of the case:

> The district court dismissed the intervening petition on the ground that it presented no claim

> against the property or the parties. The reversal by this court of such an order is an adjudication that upon the fact [sic] of the petition a valid claim was presented, and is conclusive of such prima facie validity, *not merely against objections which were in fact made, but also against those which might have been made. United States Trust Co. v. New Mexico*, 183 U.S. 535, 539-40 (1902).

II

THE ORDERS OF THE DISTRICT COURT, WHICH PETITIONER CONCEDES WERE NOT COMPLIED WITH, WERE SUFFICIENTLY CLEAR TO ENABLE PETITIONER AND THE NAVAJO TRIBE TO UNDERSTAND WHAT WAS REQUIRED OF THEM AND TO ACT ACCORDINGLY.

The court of appeals has carefully examined petitioner's contentions regarding deficiencies in the contempt citation and has concluded as follows:

> The Court's Findings of Fact signed May 29, 1974, are supported by substantial evidence and fully justify the Court's Conclusions of Law which state: . . . (App. A, p. A-18 with Petition).

It is important to note that the district court judge making those findings, Judge James A. Walsh, was one of the original judges on the *Healing* three judge panel and has been involved with every stage of the lengthy proceedings herein.

The orders of the district court were clear and specific. The Order of Compliance directed that Navajo livestock be reduced to one-half of Joint Use Area carrying capacity by October 14, 1973 (App. N, p. N-2 with Petition). On August 25, 1973 the district court informed the parties as follows:

> "I am pointing out that the Court's Order of Compliance very definitely indicates that if it can't be done voluntarily that it is going to be done involuntarily. (Quoted by the court of appeals in its opinion. App. A, p. A-19 with Petition).

As noted at page 5 of the Petition, both the government and the petitioner moved the district court to extend the time for their compliance with the Order of Compliance to October 14, 1974 and October 14, 1975 respectively, and the district court denied both motions. Despite the numerous appeals taken by petitioner from the orders of the district court, petitioner has never succeeded in obtaining a stay of any of the court's orders herein. Petitioner's pleas of ambiguity regarding livestock reduction deadlines and procedures cannot reasonably be sustained. If reasonable ambiguity had existed, it was the petitioner's responsibility to immediately clarify the ambiguity. Petitioner acted at his own peril by failing to promptly obtain such clarification in light of the unambiguous language used by the district court.

Likewise, petitioner's claim of ambiguity regarding procedures to cancel livestock permits is not sustained by the record. The Order of Compliance specifically

states that "all prior existing [grazing] permits shall be deemed cancelled as of" October 14, 1973. The administrative regulations for which petitioner now claims some application (See App. I with Petition), apply only to the cancellation of permits by local authorities of the Bureau of Indian Affairs. No mention is made in the Order of Compliance of federal regulations or procedures. All Navajo permittees were before the court through their congressionally designated representative. If confusion resulted from this clear expression by the court, it was not the result of any ambiguity on the part of the court. The alleged subjective confusion of a disappointed litigant should not be equated with presumed judicial imprecision in light of the clear language used by the court herein.

It cannot reasonably be said that the orders of the district court are either "to vague to be understood," "unintelligible," or that the court's command "defies comprehension." (*Longshoreman's Asso. v. Philadelphia Marine Trade Asso.*, 389 U.S. 64, 76 (1967)). The petitioner knew he was required to reduce livestock and prevent construction in the Joint Use Area but, as the district court found, he and the Navajo Tribe failed to take "the reasonable measures within their power and available to them", nor have they "endeavored in good faith to comply with the Court's directions" (App. A, p. A-18 and App. C, p. C-7 with Petition).

The judge most intimately familiar with the situation has made the findings and cited petitioner; the appellate court has reviewed them in a detailed, well

reasoned opinion. No reason exists for further review by this court.

III

FEDERAL ADMINISTRATIVE PROCEDURES FOR THE CANCELLATION OF THE NAVAJO GRAZING PERMITS ARE NOT APPLICABLE IN THE CASE AT BAR.

The petitioner has asserted that only the Secretary of the Interior could cancel grazing permits issued to Navajos in the Joint Use Area. See Petition, pp. 13 and 19. As noted above, the regulation which petitioner asserts is controlling on this matter, 25 CFR § 151.15 (App. I with Petition), by its own terms, applies only to cancellations by the local Bureau of Indian Affairs superintendents.

Petitioner's contention that these general regulations somehow apply to a federal court proceeding under a special jurisdictional act to quiet title and deliver possession to the parties entitled thereto, and in which the United States is a party defendant, is without substance. This is especially clear when it is remembered that the interests of all of the individual Navajos were before the court through their congressionally designated representative. This court has heretofore held that:

> It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate con-

> cerning their tribal property. *W'inton v. Amos*, 255 U.S. 373, 391 (1921).

The decision in *W'inton v. Amos* provides a complete answer to petitioner's claim that individual Navajos are somehow denied due process of law by Congress' designating a tribal authority to represent all of their interests (which, as noted above, is a claim which was *not* raised in petitioner's initial appeal from the Order of Compliance). In *W'inton v. Amos* a large group of Choctaw Indians appeared in litigation through a congressionally designated tribal representative.

> In authorizing the present suit, Congress evidently recognized that it was impracticable to bring before the court all interested individual Choctaws; hence, treating them as a class, it designated the representative who should defend for them, by analogy to the familiar practice in equity, . . . [I]t is sufficient to say that the regulation of this matter is clearly within the power of Congress, and that Congress acted within that power in constituting the governor of the Choctaw Nation the representative of the defendants, upon whom notice of the suit was to be served in their behalf, and designating the Attorney General of the United States as their attorney to appear and defend the suit. We are clear, therefore, that there is no substantial basis for the contention that the jurisdictional acts have the effect of depriving the Indians of their property without due process of law, and hence are in conflict with the 5th Amendment. . . . *W'inton v. Amos, supra*, 255 U.S. at 392.

The Court of Appeals for the Ninth Circuit has, since the *Healing* decision, held that the findings in *Healing* were res judicata as to individual Navajos asserting

rights in the Joint Use Area. See *United States v. Kabinto*, 456 F. 2d 1087 (9th Cir. 1972). The circuit court's opinion herein, which cites to *Winton v. Amos* (See App. A, p. A-13 with Petition), is entirely consistent with these authorities.

The district court had specific, independent authority from Congress to do whatever reasonably appeared necessary to deliver equal use, possession and enjoyment of the Joint Use Area to the Hopi Tribe. See *Hamilton v. Nakai, supra*, 453 F.2d 152. This authority was not withdrawn by Congress, but was expressly recognized as continuing by the Act of December 22, 1974 (App. G with Petition) (discussed in greater detail under IV below). All relevant parties were before the court — the Navajo individuals and the Secretary of the Interior as an agent of the United States. The district court concluded that the cancellation of the grazing permits was necessary to effect its purposes and clearly declare them cancelled as of a date certain. Such action was within its authority and not violative of anyone's constitutional rights.

Petitioner's assertion that the above quoted holding in *Winton v. Amos* regarding tribal representation of individual Indians has somehow been overruled is not even supported by the authorities cited by petitioner (See petition pp. 20-21, especially n. 12). Petitioner cites no authority dealing with the Indian context, let alone Indian grazing rights. Indeed, this court has recently reaffirmed that the plenary power of Congress over Indian affairs is sufficient to justify unique legislative treatment of Indians.

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, §8, cl. 3, provides Congress with the power to "regulate commerce — with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

The district court had full authority to cancel grazing permits without reference to federal administrative regulations.

IV

NO CONGRESSIONAL INTENT EXISTED TO DIVEST THE DISTRICT COURT OF JURISDICTION OR WHICH WOULD HAVE REQUIRED THE DISTRICT COURT TO ACCEPT A PLAN OFFERED BY A PARTY BEFORE THAT COURT, CONTRARY TO THE PRIOR ORDERS OF THE COURT.

Petitioner has demonstrated no support for his contention either that the Section 19(a) of the Act of December 22, 1974 (App. G, p. G-20 with Petition) divested the district court of jurisdiction to proceed to reduce livestock and restore the Joint Use Area ranges, or that it vested the Secretary of the Interior with discretion so as to bring into play the requirements of the Administrative Procedures Act (5 U.S.C. § 701 (a)(2)).

As fully reviewed by the opinion of the court of

appeals (App. A, pp. A-8 through A-11 with Petition), neither the language of the 1974 Act, nor its legislative history support the petitioner's position on this issue. The language of Section 19(a) of the 1974 Act (App. G, p. G-2[illegible] with Petition) states that,

> "The secretary is authorized and directed to immediately commence reduction of the numbers of all livestock now being grazed upon the lands within the joint use area and complete such reductions to carrying capacity. . . . The Secretary is directed to institute such conservation practices and measures within such area as are necessary to restore the grazing potential of such area to the maximum extent feasible.

No discretion is granted; the Secretary is "directed" to proceed.

Both the district court (See App. R with Petition) and the court of appeals (See App. A, pp. A-9 through A-11 with Petition) carefully reviewed the legislative history of the 1974 Act to determine whether or not the jurisdiction of the district court had been limited by the 1974 Act. As stated by the court of appeals:

> It is clear that Congress contemplated the continued jurisdiction of the District Court in controlling the supplemental proceedings in the Healing case. Its continued reference to that case in the statute and the referral of settlement agreements or recommendations to the District Court for approval or modification discloses Congress' awareness of the continuing proceedings in the Healing cases. . . .
>
> The final bill as approved by the Senate and the House, evidences the fact that Congress did not intend to supercede the existing court orders but instead, to further them. (App. A, pp. A-9 and A-11 with the Petition).

In light of these reasoned conclusions, petitioner's gratuitous statements as to what Congress "clearly" intended are unpersuasive.

A further reference to the 1974 Act itself should be conclusive. Section 18(c) (App. G, p. G-19 and G-20 with Petition) expressly confirms the continuing ancillary jurisdiction of the district court:

> Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this Act. Such actions may be commenced in the District Court by either tribe against the other, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof.[1]

Given the continuing jurisdiction of the district court over the ancillary proceedings and the government, to conclude that the government can force a plan (App. S with Petition) onto the district court under which the government would take five additional years to do what it had been ordered to complete two years previous thereto is ludicrous. The congressional language and intent was that the government, through

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[1] The term "District Court" is specifically defined by the 1974 Act to mean "the United States District Court for the District of Arizona." See Section 1(b) (App. G, p. G-2 with Petition).

the Secretary of the Interior, proceed forthwith to do what the court had previously ordered it to do. Such intent has been found to be "clearly" established by two previous careful judicial reviews in the district court and court of appeals. No reason exists why this court should assume jurisdiction herein to repeat those efforts.

CONCLUSION

Respondent Sekaquaptewa, on behalf of the Hopi Indian Tribe and its individual members, submits that petitioner has demonstrated no justification for submitting this matter to a further review by this court. The opinion of the court of appeals is well reasoned and reflects a careful and detailed review of both the underlying facts and relevant law. The opinion of the court of appeals and the orders of the district court are consistent with both the intent of Congress in passing the two relevant special jurisdictional acts, and with existing judicial precedent.

Almost fourteen years have passed since this court affirmed the Hopi right to equal use of the Joint Use Area lands. In those fourteen years the Navajos have prosecuted an appeal to the Supreme Court of the United States from the original decision, have appealed to the United States Court of Appeals six times, and have previously petitioned this court for a Writ of Certiorari. On each occasion their tactics have produced nothing but delays. The judicial decisions have been explicit and unequivocal. Never have the Navajos posted a bond or obtained a stay of execution. Never-

theless, they have, with unmitigated temerity defied the edicts of the Courts, denied the justice due the Hopi people, and tenaciously held a position that beckoned contempt proceedings.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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